Supreme Court, U.S.
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No. 93-1013

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CITY OF LOS ANGELES,
Petitioner,

v.

TOPANGA PRESS, INC., et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION, FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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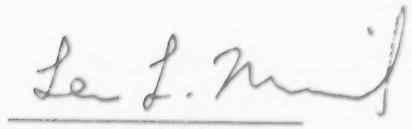
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

National Family Legal Foundation, et al. respectfully move for leave to file the attached brief *amici curiae*. Counsel for Petitioners and Respondents have consented to our filing this brief. (See Appendix A).

Respectfully submitted,



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INTEREST OF THE AMICI CURIAE

National Family Legal Foundation is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF's first Executive Director, Alan E. Sears, was the Executive Director of the Attorney General's Commission on Pornography. Former Attorney General Edwin Meese III, who presented the 1986 Commission Report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for NFLF. In

its 1986 Final Report, the Commission discussed the harm caused to communities by businesses that purvey sexually explicit materials or services. These harmful secondary effects include increased crime and the aesthetically displeasing appearance of such businesses which leads to neighborhood blighting. The Commission recognized that zoning ordinances regulating these businesses and their secondary effects are one method of minimizing these harms. Final Report of the Attorney General's Commission on Pornography at 60-61 (1986). NFLF has assisted hundreds of cities in drafting and defending ordinances that impose time, place and manner regulations on sexually oriented businesses.

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world.

Focus President Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book Pornography: A Human Tragedy which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amici's daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million.

Focus on the Family works to preserve and protect the family, and thus has particular concern and experience regarding the impact of sex businesses on

family-oriented neighborhoods.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography and sexually oriented businesses have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harmful secondary impact of sex businesses on families

and neighborhoods.

Amici are concerned about the Ninth Circuit's decision allowing economic considerations to affect the determination of whether a particular zoning ordinance has made sufficient land available for sexually oriented businesses. The decision both contradicts the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and severely restricts the ability of cities to preserve the family-friendly quality of life desired by their citizens. The Ninth Circuit judged the Los Angeles ordinance by a standard that is not constitutionally required and that was explicitly rejected by the *Renton* Court. The decision should be reversed so that cities may pursue their zoning and redevelopment plans as their citizens desire without fear of unwarranted legal challenges from sexually oriented businesses.

INTRODUCTION

The Ninth Circuit in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), upheld a preliminary injunction against the City's enforcement of Municipal Code § 1270, which regulates the location of sexually oriented businesses in Los Angeles. In doing so, the Ninth Circuit held that the ordinance presented serious questions of law with respect to the availability of alternative avenues of communication and that the district court did not abuse its discretion in finding that the balance of hardships tipped sharply in favor of the sexually oriented businesses requesting relief. *Topanga Press*, 989 F.2d at 1534. Specifically, the court held that economic viability of sex businesses locating in certain spots could be considered when determining whether that land is in the relevant real estate market and therefore whether it is truly available. *Topanga Press*, 989 F.2d

at 1530.

The Ninth Circuit is in direct conflict with this Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986), which explicitly disallowed consideration of economic factors in the determination of whether land was available to sexually oriented businesses. It also conflicts with the California Supreme Court's decision in *City of National City v. Wiener*, 3 Cal.4th 832, 842-43 (1992), ____ U.S. ___, *cert. denied* 114 S.Ct. 85, 126 L.Ed.2d 53 (1993), which followed the *Renton* holding. Finally, the Ninth Circuit ruling conflicts with decisions in the Fourth and Eleventh Circuits, both of which have refused to consider the economic viability of sex businesses that locate in certain areas. *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520

(11th Cir. 1986), *on remand* 664 F.Supp. 482, *aff'd* 838 F.2d 1220 (11th Cir. 1988). These cases both allowed land to be considered that would not be suitable under the *Topanga Press* analysis.

The Supreme Court should grant certiorari and reverse because this ruling conflicts with the Court's decision in *Renton* (and indeed resurrects the Ninth Circuit's flawed reasoning from that case), it conflicts with rulings from the Fourth and Eleventh Circuits, and it conflicts with a ruling of California's highest court on this issue.

ARGUMENT

I. Under *Renton*, Economic Considerations Are Irrelevant And Should Not Be Considered When Determining The Availability Of Land For Sexually Oriented Businesses Under A Particular Zoning Ordinance.

This Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), stated that a zoning ordinance regulating the time, place and manner of the operation of adult businesses is constitutional if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 47. The question presented here is whether alleged economic feasibility of a particular location is a permissible factor in determining whether that land is available as an alternative avenue of communication. This Court already answered this question in *Renton* by explicitly excluding consideration of the economic viability of sex businesses

in a particular location. *Renton*, 475 U.S. at 54.

The factual backdrop of the *Renton* case is significant because it reveals the direct contradiction between *Renton*'s holding and that of the Ninth Circuit in *Topanga Press*. The *Renton* zoning ordinance left available 520 acres of land consisting of "'ample, accessible real estate'" , including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.'" *Renton*, 475 U.S. at 53. Included in the 520 acres accepted by this Court as being "ample, accessible real estate" were "(1) a sewage disposal site and treatment plant; (2) a horse racing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully-developed shopping center."

Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984). The Ninth Circuit in *Renton* had ruled that, since there were no commercially viable locations within the 520 acres, the land was not truly available to the sex businesses. *Playtime Theaters*, 748 F.2d at 534. This Court specifically rejected the argument that a lack of commercially viable sites within the 520 acres constituted a sufficient basis to invalidate the ordinance. *Renton*, 475 U.S. at 54.

The court in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993) established a two-tiered analysis for the determination of whether land is available to sexually oriented businesses. In doing so, the court relied on the incorrect assertion that the *Renton* Court's statements regarding the impermissibility of considering economic factors assumed that the relocation sites were already in the "relevant" real estate market.

At tier one of the *Topanga Press* analysis, economic impact may be considered when determining whether a specific relocation site is part of the relevant market. Once it is established that the site is in the proper real estate market, economic impact may not be considered. *Topanga Press*, 989 F.2d at 1530. Factors which bear on whether a site is in the proper real estate market are whether it is unreasonable to believe that it would ever become available to any commercial enterprise; whether it is reasonably accessible to the public; whether areas in manufacturing zones have proper infra-structure such as sidewalks, roads and lighting; whether a site suits some generic commercial enterprise (warehouses, swamps or sewage treatment plants being unsuitable); and whether the site is commercially zoned. *Topanga Press*, 989 F.2d at 1531.

The *Topanga Press* holding fails to recognize the

context in which the *Renton* Court spoke. The type of land considered to be "ample, accessible real estate" by the Supreme Court in *Renton* (a sewage disposal site and treatment plant, a horse racing track and environs, a business park containing buildings suitable only for industrial use, a warehouse and manufacturing facilities, a Mobil Oil tank farm) would be unsuitable under the first tier of the Ninth Circuit's analysis because it is not in what it considered to be the "relevant" real estate market. Yet, contrary to the assertions of the Ninth Circuit, under *Renton* it was sufficient that the land was a part of the real estate market in general:

> Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. (citation omitted) The Court of Appeals accepted these arguments . . . .

> We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," (citation omitted), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.

Renton, 475 U.S. at 54 (emphasis added).

Since the land was in the real estate market in general, this Court considered it available to sexually oriented businesses. By disallowing consideration of economic factors, the Court specifically rejected the type of in-depth analysis espoused by the Ninth Circuit in *Renton* and now also in *Topanga Press*. *Renton* reveals the Court's unwillingness to second-guess the decisions

of local governments in this manner because such second-guessing will result in sex businesses receiving preferential treatment in the real estate market. That is a result not required by the First Amendment.

The *Topanga Press* decision represents a resurrection of pre-*Renton* thinking from the Ninth Circuit under the guise of a post-*Renton* clarification. As such, the decision contradicts existing precedent of the Supreme Court. The Court should therefore grant certiorari and once again reverse the Ninth Circuit.

II. The Ninth Circuit Decision Conflicts With Decisions Of The Fourth And Eleventh Circuits, Which Disallow Consideration Of Economic Factors On The Basis Of *Renton*.

The Fourth Circuit in *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991), upheld the constitutionality of a zoning ordinance restricting sexually oriented businesses to only "a few poorly lit sites in industrial areas far from tourist-

oriented businesses." *D.G. Restaurant Corp.*, 953 F.2d at 147. The court refused to consider the commercial viability of the sites, stating that the restaurant's ability to convey its message was not impeded by the ordinance. Under the Ninth Circuit's analysis, this ordinance would probably have been unconstitutional because it restricted sex businesses to an industrial zone that was not reasonably accessible to the general public and that lacked the proper infrastructure. As such, the land would not be in the "relevant real estate market" and would therefore be unavailable. *Topanga Press*, 989 F.2d at 1530-31.

Similarly, the Eleventh Circuit in *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), *on remand* 664 F.Supp. 482, *aff'd* 838 F.2d 1220 (11th Cir. 1988), vacated a pre-*Renton* district court decision which stated that land in a

municipal water works, in isolated areas and in prohibitively high rent areas was unavailable for sex business purposes. In reaching its decision, the district court relied on the Ninth Circuit's reasoning in *Renton*. The Eleventh Circuit remanded the case for reconsideration in light of the Supreme Court's holding in *Renton*. *International Food*, 794 F.2d at 1528. The Ninth Circuit in *Topanga Press* would have agreed with the district court's opinion rather than with the Eleventh Circuit's, particularly with regard to the land in a municipal water works and in isolated areas. By remanding the case, the Eleventh Circuit explicitly recognized that the *Renton* Court intended to disallow consideration of economic factors at any level in the analysis, regardless of the basis for the assertion that available land was unsuitable.

Other circuits have used analyses that conflict

with *Topanga Press*, although it is unclear whether the Ninth Circuit would have reached a different result under the facts of those cases: *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), *reh'g. denied*, 979 F.2d 211, *cert. denied*, 113 S.Ct. 1845 (1993); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *reh'g. denied*, 841 F.2d 107, *cert. denied*, 489 U.S. 1052 (1989); *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991).

The Fourth and Eleventh Circuits have held that *Renton* disallows consideration of economic factors in cases with facts that show the Ninth Circuit would have ruled differently. The Fifth and the Eighth Circuits disagree with the Ninth Circuit's statement of the law. This Court should grant certiorari to resolve this obvious conflict between the circuit courts.

III. *Topanga Press* Contradicts The Holding Of *National City*, The California Supreme Court Decision Which Followed *Renton*.

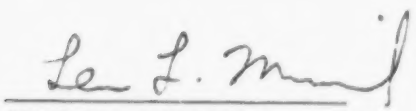
Following *Renton*, the California Supreme Court in *City of National City v. Wiener*, 3 Cal.4th 832 (1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 85, 126 L.Ed.2d 53 (1993), explicitly disallowed consideration of economic factors when determining whether land was available to sex businesses. The *National City* court took note of the fact that much of the available land in *Renton* was occupied by a sewage treatment plant; a horse racing track; industrial, warehouse and manufacturing facilities; and a Mobil Oil tank farm. *National City*, 3 Cal.4th at 842 (quoting *Renton*, 748 F.2d 527, 534 (9th Cir. 1984)). It was in this context that the *National City* court rejected an economic viability standard for determining whether an ordinance was constitutional. The court did not recognize any distinction between land inside and

land outside the relevant real estate market. Contrary to the Ninth Circuit, the California Supreme Court correctly interpreted the *Renton* holding in light of the underlying facts of the case, not in spite of them. By establishing a two-tiered analysis in which economic factors determine whether a site is in the relevant real estate market, *Topanga Press* directly contradicts the California Supreme Court's reasoning in *National City*. This Court should grant certiorari in order to resolve this conflict between the Ninth Circuit and the California Supreme Court regarding the interpretation of *Renton*.

CONCLUSION

The Ninth Circuit's decision in *Topanga Press* contradicts the U.S. Supreme Court's decision in *Renton*, and conflicts with decisions from two other federal circuits and the California Supreme Court. For these reasons, this Court should grant the petition for writ of certiorari and reverse the ruling of the Ninth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Brief of Amici Curiae were sent this 21 day of March, 1994, by first class mail, postage prepaid, to cbunsel for Petitioner and Respondent at the following addresses:

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All parties required to be served have been served.

Len L Munsil

LEN L. MUNSIL
Counsel for Amici Curiae

APPENDIX A

CONSENT FORM

I HEREBY CONSENT to the filing of an amicus curiae brief by National Family Legal Foundation in support of the petition for writ of certiorari in the U.S. Supreme Court filed by the City of Los Angeles in Topanga Press v. City of Los Angeles.

DATE: 1/10/94

Attorney of Record for Respondents

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March 18, 1994

VIA FACSIMILE AND U.S. MAIL

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Re: City of Los Angeles v. Topanga Press, et al.,
Docket No. 93-1013

Dear Mr. Munsil:

By this letter, Petitioner City of Los Angeles consents to the filing of an amicus brief by the National Family Legal Foundation in support of the Petition for Certiorari in the above case.

Very truly yours,

JAMES K. HAHN, City Attorney

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